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Supreme Court, U.S.
FILED
SEP 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1358

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM L. LUKHARD, Commissioner of the Virginia Department of Social Services,

Petitioner,

V.

ONA MAE REED, SALLIE LONG, RUTH WILCHER, OPAL MAE COOK, STELLA KING, AND ALL OTHERS SIMILARLY SITUATED,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF ON BEHALF OF AMICUS CURIAE JEANNETTE ROCHFORD

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae Jeannette Rochford and two other named plaintiffs filed suit in United States District Court for the District of Rhode Island in 1982, seeking injunctive relief from an expansive application of the "lump sum income" rule by the agency which administered Rhode Island's Aid to Families with Dependent Children ("AFDC") program. Rochford et al v. Affleck, C.A. No. 82-0470 (D.R.I. August 10, 1982)(Consent Order).

The case was promptly settled on terms fully favorable to the plaintiffs, and relief under the consent decree was extended to a class of AFDC recipients which plaintiffs had sought to represent.[1]

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1. The Court treated the case as a class action, but ruled that formal class certification was unnecessary.

The issue in Rochford was whether the cash proceeds realized from the sale of a resource (such as a car, a home, etc.) are "lump sum income" for the purposes of the AFDC program, or are simply a resource which has been converted from a non-liquid form to cash. The State quickly conceded that proceeds from the sale of a resource are a cash "resource", not "income": Rhode Island's regulations were amended, and have, since August 1982,[2] treated proceeds from the sale of resources as cash resources, not lump sum "income". Rhode Island has sought and obtained full "Federal financial participation" in its AFDC program during this period.

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2. The regulation challenged in Rochford was relatively new at the time, having been promulgated subsequent to the passage and federal implementation of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 845 ("OBRA").

Amicus Curiae submits this memorandum because under new federal regulations, and in particular under interpretations of those regulations revealed for the first time in its Brief in this Court in this case, the Department of Health and Human Services would now apparently impose on states and on AFDC recipients the same unlawful treatment of proceeds from the sale of resources that was successfully attacked in Rochford. Amicus contends, with and in support of respondents in the case before this Court, that characterization of such proceeds as "income" violates the plain meaning of the Social Security Act, and that the federal regulations in question were promulgated in violation of the federal Administrative Procedures Act.

Amicus Rochford adopts the arguments presented by respondents: The argument

presented below is limited to issues raised by the application of the federal policy and interpretation at issue in this case to facts which arose in Amicus Rochford's case and which will arise in the circumstances of large numbers of similarly situated AFDC recipients across the nation.

SUMMARY OF ARGUMENT

The "lump sum income" rule, created by Congress in 1981, carried with it no redefinition of the term "income" as used in the AFDC program. Nothing in the then-existing meaning of AFDC "income" or in any subsequent Congressional enactment would allow for inclusion of what have always been treated as "resources" as payments subject to the "lump sum income" rule. Nevertheless, the Department of Health and Human Services (HHS) has engaged in a creeping expansion of its own (as opposed to Congress') view of "income": HHS at first suggested that personal injury awards have been transformed from "resource" to "income", and most recently has suggested that "casualty loss" payments have suffered the same fate. It appears from its submissions to this Court that HHS would now characterize the pro-

ceeds from the sale of an AFDC-exempt resource as "income" subject to the "lump sum" rule.

HHS does not have the authority to arbitrarily redefine the basic parameters of the AFDC program. It is not overly simplistic, in response to HHS' linguistic revisionism, to argue that "income is income" and "resources are resources": Definitions of terms as critical as these change only with Congressional Acts, not with the mere passage of time or swing of administrative mood. In the absence of any Congressional indication that "income" means more than the term has meant in the past, HHS' steady expansion of the reach of the lump sum rule violates the Social Security Act and the Administrative Procedures Act, and is thus both substantively and procedurally unlawful. The decision of the Fourth Circuit Court of Appeals should be affirmed.

ARGUMENT

Prior to June, 1982, Amicus Rochford and her children were recipients of AFDC benefits in Rhode Island, and lived in a home owned by Ms. Rochford. The home was an "exempt" resource for AFDC purposes, under Rhode Island rules consistent with 42 U.S.C. §602(a)(7)(B).

On June 3, 1982, Amicus Rochford sold her home for $18,000, and one week later used the entire proceeds of the sale (and $300 more) to purchase a ten year old mobile home (with land) into which she and her family moved. The new home, like its predecessor, was an "exempt" resource for AFDC purposes. The question raised by this simple scenario was this: Did Amicus Rochford experience "lump sum income" which should render her ineligible for AFDC benefits for four and one half

years?[3] Or, as amicus successfully contended in her Rhode Island lawsuit, was the transaction merely a conversion of a resource from one form (real estate) into another (cash) and back to the original (real estate)?

These questions were relatively easily answered. HHS provided the direct answer in its own explanatory material published with final regulatory implementation of the "lump sum income" rule:

> Comment: One commenter questioned whether money received from the sale of allowable resources is exempt.
>
> Answer: As the term resources includes non-liquid assets, the

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3. Application of the lump sum income rule to Amicus Rochford's situation led to an attempt by Rhode Island to terminate her from the AFDC program and render her ineligible "until November, 1986."

> change from a non-liquid asset, e.g. a bicycle valued at $50 to cash of $50 through the sale of that asset, does not change the total value of the assets held and such resource would be exempt if the allowable statutory amount were not exceeded.

47 Fed. Reg. 5657 (February 5, 1982)(emphasis added)

Thus, it was clear in 1982 (to the Rochford litigants, and to other states' welfare administrators, who reached the same conclusion) that conversion of a resource into cash created a cash resource, not "income".

Respondents argue forcefully in their Brief that HHS has historically defined resources to include transformation of resources into other resources. Cash proceeds from the sale of resources are clearly in the mainstream of this definition. Amicus does not repeat Respondent's argument here, but adopts it fully.

Remarkably, in the absence of any Congressional change in the AFDC definitions of "income" and "resource", HHS appears to have completely reversed its position, and would now characterize proceeds from the sale of property as lump sum "in- come", and not as a "resource". Although HHS (understandably) avoids explicitly so stating, its recent regulatory pronounce- ments and its Brief to this Court in the present case reveal the extent to which its steadily expanding definition of "in- come" has swallowed what was formerly a "resource".

Respondents document in detail in their Brief that "personal injury awards" were never included as "lump sum income" under federal regulations until HHS' March 18, 1986 announcement of "final" lump sum rule regulations. 51 Fed. Reg. 9196-9197.

Now, in its Brief to this Court, HHS goes much further:

> The Secretary's new regulation requires the states to treat casualty loss and personal injury loss awards similarly: Both are now treated as "income" subject to [lump sum rule] proration..."

(Brief for the Secretary of HHS, at pp. 9-10) (emphasis added).

At pp. 18-19 of his Brief, the Secretary states even more forcefully:

> "The Secretary's rules now clearly require the states to treat awards for casualty losses and personal injury...losses similarly: Both are 'income'"...

Id. pp. 18-19.

These arguments are fabrications: The "Secretary's rules" nowhere even mention "casualty losses", and certainly nowhere "clearly require" any particular treatment (i.e. "income" v. "resource"). The phrase "casualty loss" appeared for the first time in the Secretary's Brief to this Court.

Beyond their simple incorrectness,[4] the Secretary's references to "casualty loss" payments as lump sum income reveal the federal intent to characterize any lump sum of money as lump sum "income". The "casualty loss" characterization is of particular concern to Amicus Rochford (and others who might sell an AFDC-exempt resource) because it strongly suggests that the Secretary now also characterizes proceeds from the sale of a resource as lump sum "income". Indeed, it is hard to imag-

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4. HHS' argument before this Court that casualty loss payments are "lump sum income" is contradicted by the explanatory material accompanying the Secretary's own March 18, 1986 regulatory amendments: "States must disregard from the lump sum payment any amount that is earmarked and used for the purpose for which it is paid, i.e. monies paid for ... replacement or repair of resources, etc." 51 Fed. Reg. 9197.

ine the Secretary characterizing an insurance agent's payment for the loss of a home to fire as "income" while characterizing a buyer's payment of the same amount of money for the same home as a "resource".

Thus, the Secretary's own pronouncements in the course of the present litigation reveal the extent to which the HHS characterization of "income" has grown. Without the benefit of even a single word of Congressional directive, a transaction which (the Secretary stated in 1982) simply changed an exempt resource into a cash resource now creates "income".

The federal expansion of the definition of "income" leaves even Petitioner Lukhard behind. At p. 19 of his Brief, Petitioner states:

> "Virginia does not require recipients who own an allowable resource, and who either sell that resource or lose it to fire or

> other casualty, to spend the monies from the sale or any insurance proceeds to meet current living expenses. Such monies are treated as a resource, not subject to the lump sum rule."

Brief on behalf of Petitioner, p. 19.

Petitioners' position on this point is consistent with the long-standing federal definitions of "income" and "resource", and is even consistent with the March 18, 1986 federal regulatory amendment, the Secretary's suggestion to the contrary notwithstanding.

Thus, the ever-widening swath cut by HHS' definition of "income" does not stand up to analysis. Neither HHS' historical definition of "income" and "resource" nor current interpretations by the Petitioner or other states support the HHS position. The reach of the "lump sum income" rule to "casualty loss payments" and, by extrapolation, to cash proceeds from the sale of

resources illustrate the degree to which HHS has departed from the definition of "income" Congress necessarily meant to incorporate in creating the lump sum income rule.

CONCLUSION

For the reasons set out here and in Respondent's Brief, the decision of the Fourth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

Jeannette Rochford,

by her attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that on September 29, 1986, I served three copies of the above Brief on Behalf of Amicus Curiae Jeannette Rockford, by first-class mail, to the following:

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